

MARY PERRY, Widow,
and JOHN PERRY, sur-
viving Executors of Captain
BENJAMIN PERRY,
Deceased, and others.

Appellants.

HUGH MERVIN,
and
EDWARD REILY,

Respondents.

The Appellants CASE.

1649. **T**HE said Benjamin Perry served as an Officer in the *English Army in Ireland*, and after suppressing of the Rebellion had the Towns and Lands of *Naule, Flemingtown, Boringtown, Moresides, Kendroestown, Dardistown, Cloughan, and Clougherstown*, in the County of *Meath*, containing in the whole 839 Acres, set out and allotted to him, in satisfaction of 1695*l. 1s. 3d.* that had been due to him for his Service in that Kingdom.
- Apr. 1665. The said Benjamin continued in Possession of all the Premises till April 1665, and then being desirous to return into *England*, he entered into a Treaty with Sir Audley Mervin, then Prime Serjeant at Law for the Sale of the said Lands; and at length they came to this Agreement, That the said Sir Audley should pay him Six Years Purchase for the Premises, and be at all Charges in prosecuting his Claim before the then Commissioners for putting in Execution the Act of Settlement and Explanation, or in getting Reprisals for any part of the Premises that should be decreed to others: And the said Perry made Sir Audley his Attorney and Agent for that purpose; and thereupon the said Benjamin Perry did, by Deeds of Lease and Release, convey the Premises to the said Sir Audley and his Heirs, for 1200*l.* therein said to have been paid (tho' in reality 200*l.* only was paid; for which Summ of 200*l.* the said Sir Audley was to have the Mansion-House and Demefine of the *Naule*;) and, for securing the rest of the Purchase-Money, the said Sir Audley, by a Deed of Lease, dated the same Day, did Demise all the Premises (except the said Mansion-House and Demefns) to the said Benjamin Perry, for 1000 Years, under a Proviso to be void whensoever the said Sir Audley or his Heirs should pay Six Years Purchase for the Lands.
- Some Years after the said Sir Audley Mervin paid the said Benjamin Perry the further Summ of 400*l.* for which the said Benjamin did convey and fet over to the said Sir Audley Lands to that Value, at the rate of Six Years Purchase; and, by Agreement, kept in his Possession 100 Acres in the *Naule*, a third part of *Boringtown*, the Lands of *Flemingtown, Moresides, Kendroestown, Dardistown, Cloughan, and Clougherstown*, in lieu of the remaining part of the Purchase-Money.
- Feb. 1665. Sir Audley Mervin, in pursuance of the said Authority and Title exhibited his Claim before the said Commissioners, setting forth that the Premises were allotted to the said Benjamin in satisfaction of a Debenture of 1685*l. 1s. 3d.* and that the Lands amounted only to 839 Acres, which was much less than the two thirds which the said Benjamin was to have by the Explanatory Act; and in regard the said Benjamin was in *England*, he prayed, if any overplus were found in his Possession, that he might have the Preference of placing Deficiencies thereon.
- May 1666. The said Claim was heard, and upon Proof of the said Benjamin Perry's Title to the Premises, the same were decreed to the said Sir Audley Mervin, without any saving of the said Lease or Term of 1000 Years.
- Nov. 1666. On Application made to the said Sir Audley Mervin, he did, by another Deed, confirm and ratify the said Term of 1000 Years, and did thereby Covenant, that he would, within 18 Months, pass Letters Patents of the Premises, and that he and Dame Martha his Wife, would make further Assurances of the Premises, for the residue of the said Term, and for the said Benjamin Perry's quiet Enjoyment of the same, against Certificates and Letters Patents sued, or to be sued forth of the said Premises.
- June 1668. The said Sir Audley Mervin obtained Letters Patent of the Premises, in pursuance of the said Decree, and whilst the said Benjamin Perry was in *England*, fraudulently prevailed with the said Perry's Tenants, on the Lands of *Moresides, Kendroestown, Dardistown, Cloughan, and Clougherstown*, to betray the Possession to him, and then pretended the said last mentioned Lands had been retrenched, and that he had placed Deficiencies on them in his own Right, and that he did not get them under Perry's Title.
1673. The said Benjamin Perry returned into *Ireland*, and exhibited his Bill in the High Court of Chancery setting forth the said Matters, and his Title to the last mentioned Lands, and the unfair Proceedings of the said Sir Audley Mervin, and prayed to be restored to, and quieted in his Possession; and before the Cause could be brought to a Hearing, the said Sir Audley died, leaving the Respondent Hugh Mervin, and others, his Executors; against whom the said Benjamin Perry revived the Suit, and afterwards the said Benjamin Perry died, leaving the Appellants, Mary and John, Executors of his Last Will, by which he devised the Purchase-Money due out of the said last mentioned Lands to the Appellant Mary and his Children.
1680. The Appellant Mary, as Executrix of her Husband, and Guardian of her Children, revived the Suit against the Executors of Sir Audley, but the Respondent, Hugh Mervin, designing to render her unable to pursue her Right, brought several Vexatious Suits; and at length, partly by the Treachery of her Tenants, and partly by open force, turn'd her out of Possession of that part of the Estate to which she had undeniable Title, and which she afterwards recovered in *Forma Pauperis*, whilst her Children were necessitated to come into *England* for some Relief and Subsistence among their Relations and other Charitable People.
- That the late War in *Ireland* beginning soon after, nothing could be further done in the said Suit till after the Reduction of that Country; and then the Respondent Mervin pretending that he had Mortgaged the said Lands (among many others) to the other Respondent, the Appellants filed their Bill in the Chancery of *Ireland* against the Respondents, for an Account of the Profits, and to be restored to, and quieted in the Possession of the Lands pretended to have been retrenched; and the Respondent Reily, by his Answer, insisted, That he had no notice of the Appellant's Title to the retrenched Lands before his Mortgage; and the Respondent Mervin insisted, That his Father had placed Deficiencies of his own on them, and had passed them in distinct Letters Patent; and the Cause coming to be heard, the Lord Chancellor decreed, That the Respondent Mervin should not pay, or account for the Lands mentioned to be Retrenched; and on the 12th of December 1705. he declared, That the Appellants ought not to have any Relief against the Respondent Reily, as to them Lands; and therefore decreed the Bill to be dismissed without Costs, as to the Respondent Reily, in relation to those Lands.
- Dec. 1704. From which Orders or Decrees, so far as the same relate to or concern the Lands supposed to be Retrenched, this Appeal is brought before your Lordships, and the Appellants humbly hope the same will be Reversed.

Reasons for Reversing the Decree. 1. For that there is no Proof in the Cause, that the said Lands were ever Retrenched, and the contrary is proved by the proper Officer; and it is apparent by Sir Audley Mervin's Claim, that no part thereof was to be Retrenched, in regard the whole was short of the two thirds which were to be enjoyed without Retrenchment; and there is no notice taken in Mervin's Decree or Patent of any Retrenchment.

2. If the said Lands had been Retrenchable, yet the said Sir Audley Mervin acting as Captain Perry's Agent or Attorney, ought to have placed Captain Perry's Deficiencies thereon.

3. Tho' the said Sir Audley had never so good a Title to them, yet he, and all those deriving under him are bound by the Lease of 1000 Years, and the Confirmation in November 1666 after the Decree, which tho' made before Mervin had passed Patent, or got the Title in Law, yet are made good and binding by an exprefs Clause in the Act of Settlement. And then the Appellants having good Title, both in Law and Equity, the Respondent Reily's pretence of being a Purchaser without notice is insignificant.

Sam. Dodd.